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No. _____

In the Supreme Court of the United States

October Term, 1986

FIRST NATIONAL BANK OF CHICAGO, TRUSTEE OF THE SIX IRREVOCABLE INTER VIVOS TRUSTS CREATED BY THE LIVING TRUST INDENTURE DATED JUNE 7, 1965, BY ROY E. CRUMMER AND HAZEL B. CRUMMER AS SETTLORS, AND ROY E. CRUMMER, JR., AS TRUSTEE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

HAIGHT, DICKSON, BROWN & BONESTEEL,
DEAN V. AMBROSE, and
ROY G. WEATHERUP
201 Santa Monica Boulevard
Post Office Box 680
Santa Monica, California 90406
Telephone: (213) 458-1000

Attorneys for Petitioner
FIRST NATIONAL BANK OF CHICAGO

Westside Law Publishers Los Angeles, California (213) 477-0491

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PETITION FOR A WRIT CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

Question Presented.

This petition for a writ of certiorari presents but a single question for review, which can be framed as follows:

> Should a taxpayer be forced to forfeit the million dollar benefit of an unquestionably valid tax deduction for interest because of a highly technical interpretation of *Internal Revenue Code* section 6512(a),[1] where the interest was not part of the tax due, where the amount of interest could not be calculated prior to the conclusion of the underlying tax court proceedings, and where the government has contended that the Tax Court has no jurisdiction over interest?

List Of Parties.

There are only two parties to this proceeding. They are the United States of America, in its capacity as a tax collector, and the First National Bank of Chicago, in its capacity as the trustee of the Six Irrevocable Inter Vivos Trusts created by the Living Trust Indenture dated June 7, 1986, by Roy E. Crummer and Hazel B. Crummer as Settlors, and Roy E. Crummer, Jr., as Trustee. As noted in the opinion of the United States Court of Appeals for the Ninth Circuit, the trusts are presently administered by Continental Bank and Trust Company. *First National Bank of Chicago v. United States*, 792 F.2d 954 (1986). However, the Ninth Circuit did not follow the suggestion that Continental Bank and Trust Company be substituted as the party plaintiff in the case.

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[1]All references are to sections of the *Internal Revenue Code*, 26 *U.S.C.*, unless otherwise specified.

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FIRST NATIONAL BANK OF CHICAGO, TRUSTEE OF THE SIX IRREVOCABLE INTER VIVOS TRUSTS CREATED BY THE LIVING TRUST INDENTURE DATED JUNE 7, 1965, BY ROY E. CRUMMER AND HAZEL B. CRUMMER AS SETTLORS, AND ROY E. CRUMMER, JR., AS TRUSTEE,

Petitioner,

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UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI

To the Honorable William H. Rehnquist, Chief Justice of The United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

Petitioner, the First National Bank of Chicago, as trustee, respectfully prays that a writ of certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in the proceeding on June 24, 1986.

Opinion Below.

The opinion of the Ninth Circuit is reported as *First National Bank of Chicago v. United States*, 792 F.2d 954 (9th Cir., 1986). It is annexed as Appendix A to this petition.

The opinion of the district court, which was unreported, and which was reversed by the Ninth Circuit, is reproduced as Appendix B to this petition. A copy of the judgment of the district court entered on the basis of the district court's opinion is Appendix C.

Jurisdiction.

The judgment of the United States Court of Appeals for the Ninth Circuit was handed down and entered on June 24, 1986. This Court's jurisdiction is invoked under 28 *U.S.C.* section 1254(1).

Statute Involved.

The federal statute involved in this case is section 6512(a) of the *Internal Revenue Code*, 26 *U.S.C.* section 6512(a) (1982). The relevant provisions of the statute are quoted in full in Appendix A.

Statement of the Case.

Petitioner First National Bank of Chicago (hereinafter "petitioner" or "taxpayer") is the successor trustee of the six irrevocable inter vivos trusts created pursuant to the Living Trust Indenture dated June 7, 1965 by Roy E. Crummer and Hazel B. Crummer as Settlors, and Roy E. Crummer, Jr., as Trustee (hereinafter, "the Crummer Trust"). The Crummer Trust was the distributee of the residue of the estate of Hazel B. Crummer, deceased (hereinafter "the estate"), which included a timely filed claim for refund of federal estate taxes made by Roy E. Crummer, subsequently deceased, executor of the estate. The refund claim is the subject of this action. On September 6, 1984, after a trial on the merits, the district court awarded petitioner its claimed refund of $478,494.00, plus interest, less an equitable recoupment of $49,056.21, plus interest. Petitioner was also awarded its costs. The equitable recoupment represented that portion of the refund attributable to the previous deduction of the statutory interest expense on the estate's fiduciary income tax return

for the taxable year ending August 31, 1978. [CR 23, Exhibit 23.][2]

Respondent, United States of America, appealed from the judgment. However, in both its answer to the complaint and its pretrial memorandum of contentions of fact and law, respondent's only contention was that petitioner's claim was precluded by the principle of *res judicata* because of the Tax Court stipulation. Indeed, this was memorialized in paragraph 8 of the pretrial conference order lodged April 24, 1984.

On September 29, 1969, Hazel B. Crummer, a resident of the City of Reno, County of Washoe, State of Nevada, died testate. Pursuant to an order of the Nevada Probate Court made on October 16, 1969, Roy E. Crummer was appointed sole executor of the estate. [CR 15, 3:14-25.] On or about June 4, 1971, the executor timely filed the federal estate tax return for the estate with the tax shown to be due in the amount of $4,778,008.32. The Commissioner of Internal Revenue, upon subsequent audit of the return, asserted a deficiency and issued a statutory notice of deficiency against the estate. The executor filed a petition with the United States Tax Court. [CR 15, 3:21-4:3.]

Negotiations preceding the stipulated settlement lasted from 1974 until 1977. When the California death taxes were determined, the parties entered into a stipulation in the amount of 1,340,603.00, exclusive of interest. This stipulation was entered in the United States Tax Court on October 28, 1977. [CR 15, 4:4-19.]

Interest on the stipulated decision was not computed or assessed until after the entry of decision. Interest on the tax deficiency and its ultimate effect on the federal estate tax liability was never discussed by the parties. Furthermore, the stipulation neither took into account the interest computed

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[2]CR designations refer to docket control numbers assigned to documents appearing in the Clerk's Register by the Clerk of the district court. The subsequent references are to page and line numbers within the particular document.

and attributed to the tax deficiency nor its effects on tax liability. [CR 15, 4:20-27.]

The estate paid the agreed federal tax deficiency in installments, exclusive of interest. The last payment was made on April 17, 1978. The interest due on the stipulated deficiency was ultimately determined to be $630,700.17, and this payment was also made on April 17, 1978. [CR 15, 5:1-6.]

A timely claim for refund was made by the executor on or about April 2, 1980, based on the fact that the statutory interest paid was a deductible administrative expense under section 2053(a)(2). The Internal Revenue Service rejected the claim, and the estate initiated the claim for refund in the district court.

The estate was administered in the jurisdiction, and under the probate laws, of the State of Nevada, where the payment of federal estate tax, including all interest, is a proper administrative expense. The above payments were reported to the probate court, and approved by court order dated September 3, 1981. [CR 15, 5:7-12.] Respondent does not dispute the propriety of the deduction in Nevada.

If the petitioner prevailed, it was agreed by the parties that the amount of judgment would be $478,794.00 plus interest. [CR 15, 5:18-22.]

No waiver under section 642 (g) was ever filed by or on behalf of the estate. [CR 15, 5:23-24.]

Apparently, in order to preserve its options, the interest deduction claimed was included in the estate's fiduciary income tax return for the taxable year ending August 31, 1978. [CR 11, Exhibit 23.] There is no dispute as to the fact that statutory interest is an allowable deduction on either the estate tax return or federal income tax return.

In the pretrial conference order, the court determined that the interest paid on the stipulated federal estate tax deficiency is a deductible administrative expense under section 2053(a)(2). [CR 15, 5:13-15.] Furthermore, if the claim was

not barred by *res judicata*, petitioner was entitled to its claim for refund.

The Tax Court stipulation was set forth in Exhibit 20 of the joint exhibits. [CR 23]. The stipulated decision provided for a deficiency of $1,340,608.00, and was signed by the judge. The lower portion of the stipulation is signed by counsel for both parties. The stipulated decision of the Tax Court itself provides for the specification of the amount of deficiency only. This is proper, since the decision of the Tax Court must be for a definite monetary amount. The Tax Court could not have entered a judgment for the deficiency plus interest because the Tax Court had no jurisdiction over statutory interest, and moreover, such a judgment would be indefinite, and therefore in violation of its own rules of procedure.

The complaint for refund was filed on March 31, 1983. Petitioner alleged the facts outlined above, and made a claim for refund in the amount of $478,794.00. [CR 1.] On July 19, 1983, respondent answered, and contended that the claim was barred based on principles of *res judicata*. The joint exhibit list was filed by petitioner on April 10, 1984. [CR 11.] In the pretrial conference order, it was specified that respondent objected to all exhibits on the basis of relevancy except for Number 20. [CR 15, 7:11-12.]

On April 10, 1984, petitioner filed its pretrial memorandum of contentions of fact and law. Respondent filed its pretrial memorandum on April 17, 1984. Respondent further indicated that it would require no witnesses. Petitioner listed two representatives of the estate as witnesses who would testify that they had no intention of foregoing the interest deduction as part of their stipulation to the deficiency. [CR 12.] On April 24, 1984, the pretrial conference order was lodged with the court which listed the stipulated facts as set forth above. Respondent then submitted a supplemental pretrial memorandum of contentions on May 17, 1984, which raised the issue of section 6512(a) for the first time. At the end of the trial, counsel for respondent requested to be relieved from

his stipulation that *res judicata* was the only bar to petitioner's claim for refund. [R.T. 54:6-12.][3]

On May 22, 1984, the claim for refund was heard before Judge Edward Rafeedie. The court filed its decision on May 25, 1984, and awarded judgment in favor of petitioner.

The court held that the doctrine of *res judicata* did not apply to the case at bar because the doctrine as applied to tax cases does not preclude the raising of new claims which had not arisen in the prior action, but are based upon new facts created by the first action. The interest in question here could not be deducted at the time of the first suit because it was vague and uncertain, and could not be estimated with reasonable certainty. [CR 25, 3:4-12.] Further, the court held that the state of the law, at the time of the stipulation, allowed a deduction for statutory interest on a deficiency. However, when and how the deduction might be taken was not provided for until revenue rulings in 1980 and 1981. Accordingly, the court agreed with petitioner's position that the interest did not arise until April of 1978 and therefore could not be precluded by the prior stipulation.

The court went on to hold that section 6512 had no application to petitioner's claim for interest. The court determined that interest on a deficiency is separate and apart from the tax, and that section 6601(e)(1) specifically excluded deficiency interest from being treated as part of the tax. Since the case at bar only related to the assessment of interest, section 6512 cannot prevent petitioner's claim for refund based on such assessment. [CR 21, 4:5-5:21.]

The court ordered judgment in favor of petitioner for $478,794.00 plus interest and costs.

On June 7, 1984, respondent made a motion for reconsideration of judgment. Respondent alleged for the first time that petitioner had previously deducted the statutory interest on its income tax return and hence had obtained

[3]The R.T. designation refers to the reporter's transcript of the proceedings before the district court.

a "double deduction" as a result of the judgment. [CR 24, 3-4.] Respondent then attempted to relitigate the issues in the case.

On July 9, 1984, petitioner filed its opposition to respondent's motion. Finally, on July 17, 1984, respondent replied to petitioner's opposition and once again raised the double deduction issue. At the hearing on July 23, 1984, the court denied respondent's motion for reconsideration on condition that petitioner stipulate to an equitable recoupment in favor of respondent to allow for the previous deduction of the interest on the estate income tax return.

On September 10, 1984, a modified judgment was entered in favor of petitioner. Petitioner was awarded the sum of $478,794.004 plus interest as provided by the Internal Revenue Code, less $49,056.20, and less interest on this amount from June 30, 1984,[4] plus its costs of action.

Basis of Federal Jurisdiction

The United States Court of Appeal for the Central District of California properly had subject matter jurisdiction over the action below by virtue of 28 *U.S.C.* section 1346(a)(1). The judgment of the District Court in favor of petitioner that was entered on September 10, 1984 was a final judgment as to that court, disposing of all claims involving the parties. The United States Court of Appeals for the Ninth Circuit had jurisdiction over the appeal taken by the United States, pursuant to 28 *U.S.C.* section 1291.

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[4]As of December 31, 1985, the adjusted value of the judgment was computed to be approximately $1,007,233.00. The interest rates and "interest factor" used in the computation were derived from 26 *U.S.C.* section 6621 and the tables contained in Treasury Regulations, section 301.6621-1 et seq.

ARGUMENT

I.

THE TAX COURT DID NOT CONSIDER THE ISSUE OF INTEREST, AND PROBABLY COULD NOT HAVE DONE SO, BECAUSE THE STATUTORY INTEREST DEDUCTION COULD NOT HAVE ARISEN PRIOR TO THE STIPULATION.

The government claimed that the doctrine of *res judicata* barred petitioner's claim for refund in the district court because the claim either was, or could have been, raised in the Tax Court. The district court below determined that this contention was devoid of merit because *res judicata* as generally applied, and as specifically applied, in tax cases, does not preclude the raising of new claims, which have not arisen in the prior action, but in fact are based upon new facts created by the first action. The court relied on *Martin v. Broderick*, 177 F.2d 886 (10th Cir. 1949), for the principle that:

> "Certainly a claim is not barred until it comes into being and can be appropriately asserted. It has never been thought that a judgment barred a second action, based upon new facts created by the first. The fact that both actions arise out of the same subject matter is immaterial." 177 F.2d at 888.

In the case at bar, the amount of statutory interest was unknown when the parties entered into the stipulated Tax Court decision. Neither party discussed nor dealt with the issue of the impact of the statutory interest on the estate tax liability. This claim arose only after the entry of the stipulated decision and the subsequent payment. Neither party had any way of knowing the amount of statutory interest that would ultimately be due. Furthermore, at the time of the settlement, plaintiff had no reasonable estimate of when the tax would be paid. In fact, plaintiff had the right to apply for an extension of time to pay the tax, and thereby further increase the amount of deductible statutory interest.

As an additional factor, the Tax Court, the forum in which the parties entered the stipulated agreement in October of 1977, had no jurisdiction over the determination of statutory interest. Section 6601(e)(1), section 6212, *Rules of Practice and Procedure United States Tax Court*, Rule 13; *Commissioner of Internal Revenue v. Kilpatrick's Estate*, 140 F.2d 887 (6th Cir. 1944); *Standard Oil Company v. McMahon*, 44 F.2d 11 (2nd Cir. 1957); *Estate of Mary Redding Shedd v. Commissioner*, 37 T.C. 394, 399 (1961), *aff'd*, 320 F.2d 638 (9th Cir. 1963).

The government takes the position that the precise amount (or nearly so) of statutory interest on the deficiency assessment could have been determined prior to the execution of the stipulated decision, with the result that the claim to deduct arose at that time in the Tax Court. This represents a complete reversal of respondent's position in *Revenue Ruling* 80-250, 1982-2 *Cum. Bull.* 278, and the recent case of *Snyder v. United States*, 84-1 USTC par. 13,564 (D. Md. 1984). *Revenue Ruling* 80-250 states:

> "In situations where the executor elects to extend the time for the payment of the estate tax under section 6166A the executor has the option to accelerate payment, and in certain circumstances must accelerate payment. The possibility that payment may be accelerated renders any estimate of future charges vague and uncertain, within the meaning of section 20.2053-20.2053-1(b)(3) of the regulations. These authorities hold that the interest to be paid subsequently is vague and uncertain under the estate tax regulations."

These authorities clearly hold that the interest to be paid subsequently is vague and uncertain under the estate tax regulations. For that reason, the *Snyder* court accepted the government's position there that deductible interest may not be computed in advance but only as the interest accrues, and any deduction must first be used to reduce subsequent installments of tax due, or, if the final computation shows

that an aggregate overpayment has occurred, then a refund claim is appropriate. Where, as here, the interest was paid in a lump sum at the completion of the principal payments, a refund can be appropriately claimed.

Petitioner in this case acted without the benefit of these guidelines, and anticipated to some extent the procedures subsequently implemented by respondent and validated by the *Snyder* court. Petitioner's approach is supported by the treatment accorded attorney's fees at the time of the Tax Court settlement. In *Revenue Ruling* 61-59, 1961-1 *Cum. Bull.* 418, which was in effect at the time of the stipulation, attorney's fees were allowed as a deduction even if not claimed at the Tax Court proceeding, if they were paid within 60 days after the decision of the Tax Court became final. This position did not change until the respondent issued a subsequent ruling in 1978. *Revenue Ruling* 78-323, 1978-2 *Cum. Bull.* 240. In the latter ruling, the government reversed its position stating that such fees are only deductible if the deduction is reflected in the decision of the Tax Court. However, this ruling was to be effective only for Tax Court petitions filed 60 days after its publication, and consequently had no impact on the case at bar.

The government, however, seeks to use this foresight to avoid its liability by claiming, contrary to its own stated position, that petitioner erred in anticipating the procedure but rather was required to make a claim in the Tax Court under unknown procedures in order to avoid the assertion of *res judicata*. In *Magruder*, the Fourth Circuit makes a particularly apt observation with respect to the respondent's position in the case at bar, as follows:

> "Hindsight is, of course, much clearer than foresight. It is, therefore, easy now to suggest that the executor's attorneys here should have expressly raised the question of the deductibility of the attorneys' fees before settlement of the suit for refund. *Under the then existing facts and the then seeming state of the law, it might well be asked whether the obligation to raise this question at that*

> *time did not rest rather on the Government.* As a fact, the question was not then raised or even suggested by either party," (Emphasis added.) 159 F.2d at 916-917.

Applying the law which has developed to date concerning interest deduction makes clear that the present claim could not have arisen prior to the date that the stipulated decision became final. The computation could not then have been made because *Revenue Ruling* 80-250 unequivocally states that the sum is vague and uncertain until accrual. The examination of whether a refund is available, and the determination of the amount of the refund, must come after final payment according to *Revenue Procedure* 81-27, 1981-2 *Cum. Bull.* 548. Interest does not accrue until all events establishing the liability for the interest have occurred, and the amount of the interest can be determined with reasonable accuracy. *Treasury Regulations* section 1.446-1(c)(1)(ii). Until the stipulated Tax Court decision became final, all events which gave rise to the liability for interest had not occurred; and therefore, as mandated by *Revenue Ruling* 80-250, the interest deduction had not arisen and could not be claimed. See for example, *Seiberling Rubber Company v. United States*, 297 F.2d 842 (Ct.Cl. 1962) (deduction for excess profits tax liabilities not allowed to accrual basis taxpayer until decision of the Tax Court establishing such liability became final).

The subsequent review of the claim as prescribed, and as actually occurred in the case at bar, is not inconsistent with the law as it existed in October of 1977. The only authority then in existence was a Tax Court case, *Estate of Bahr v. Commissioner*, 68 T.C. 74 (1977). As the district court concluded in *Snyder v. United States*, 84-1 USTC par. 13,564 (D. Md. 1984), the *Bahr* case stands for the principle that projected interest is deductible; however, *Revenue Ruling* 80-250 and *Revenue Procedure* 81-27 set forth when and how that deduction may be taken. The ruling and procedure therefore controlled the question before the court as to when petitioner's asserted claim arose. On this basis, petitioner

submits that the claim for deduction arose when the interest accrued, and that the claim for refund arose after the final payment was made. As the interest in this case was paid in a single payment, the claim for the interest deduction did not arise until April of 1978 when the last installment of the tax deficiency was paid. Therefore, the present claim for refund was not and could not have been precluded by the prior Tax Court proceedings.

II.

CONTRARY TO THE VIEW OF THE NINTH CIRCUIT, THE DISTRICT COURT PROPERLY DETERMINED THAT SECTION 6512 DOES NOT APPLY TO THE CASE AT BAR BECAUSE STATUTORY INTEREST IS NOT PART OF THE TAX, AND IT PLAYED NO ROLE IN PLAINTIFF'S PETITION TO THE TAX COURT.

The district court below examined section 6601, which treats interest on underpayment, nonpayment, or extensions of time for payment, of tax, and concluded that deficiency interest is specifically excluded by section 6601(e)(1) from being treated as part of the tax. This latter section provides:

> "(e) Applicable rules. — Except as otherwise provided in this title —
>
> "(1) Interest treated as tax. — Interest prescribed under this section on any tax shall be paid upon notice and demand, and shall be assessed, collected, and paid in the same manner as taxes. Any reference in this title (*except subchapter B of chapter 63 relating to deficiency procedures*) to any tax imposed by this title shall be deemed also to refer to interest imposed by this section on such tax." (Emphasis added.)

Subchapter B of chapter 63 addresses and defines the deficiency procedures in the cases of income, estate, gift, and certain excise taxes, and is the statutory authority for the

proceedings which resulted in the stipulated deficiency in this case. Thus, the district court concluded that interest on a deficiency is not part of the tax. This premise is further supported by the Tax Court decision in *Estate of Bahr v. Commissioner*, 68 T.C. 74 (1977) (quoting *Capital Building & Loan Association v. Commissioner*, 23 B.T.A. 848, 849 (1931)) as follows:

> "It has been consistently recognized by this and other courts that 'interest on a tax is not a tax, but something in addition to a tax.' " 68 T.C. at 79.

On this basis, the district court below reasoned that the tax to which section 6512(a) applies means tax exclusive of interest. Thus, section 6512(a) does not bar a refund suit concerned with the assessment of statutory interest, which the district court below determined was the substance of the case at bar. The respondent which so often has used the "substance over form" doctrine as a sword against taxpayers, sought to use it as a shield by complaining in its opening brief that petitioner sought a refund of taxes. [A.O.B. at page 15.] Notwithstanding respondent's lament, the court properly determined that the substance of petitioner's action was a claim for refund based on statutory interest.

The controlling authority on this subject, *Britton v. United States*, 532 F.Supp 275 (D. Vt. 1981), aff'd 697 F.2d 288 (2d Cir. 1982), makes clear that the tax to which section 6512(a) applies means the tax exclusive of interest. The reasoning of the *Britton* court is set forth in the next section, wherein the court definitively stated that only the underlying assessment is within section 6512.

In the case at bar, it was stipulated at paragraph 5(g) of the pretrial conference order that:

> "The negotiations which preceded the stipulated decision lasted from 1974 until 1977 and involved various evaluation and deduction adjustments. None of these adjustments or issues are in dispute in this contest."

Statutory interest played no role in either the deficiency notice or the Tax Court proceedings, and therefore the suit for refund in the district court was proper and not barred by section 6512, as determined by the district court below.

III.

ALTHOUGH THE NINTH CIRCUIT FAILED TO CONSIDER THE ISSUE, IT SHOULD BE HELD THAT THIS CASE FALLS WITHIN THE STATUTORY EXCEPTION SET FORTH IN SECTION 6512(a)(2).

As discussed above, the government unequivocally states in its principal brief that the "Tax Court entered a stipulated decision finding an estate tax deficiency of $1,340,603.00 plus statutory interest." [A.O.B., page 7.] Petitioner has conclusively demonstrated previously that such a judgment would be contrary to section 7459(c) and Rule 155, *Tax Court Rules of Practice and Procedure*, which require that the decision specify a dollar amount. *Estate of Bailly v. Commissioner* 81 T.C. 949, 952 (1983). The stipulated decision of the Tax Court involved only an agreement as to the dollar amount of the tax deficiency, namely $1,340,603.00.

As demonstrated previously, the statutory interest did not arise until after the Tax Court decision became final. Furthermore, the amount of interest was not capable of calculation with "reasonable certainty," and therefore could not be raised in the Tax Court; the Tax Court had no jurisdiction over the subject of statutory interest; the interest was separate and apart from the tax; neither party raised the issue of deductibility of statutory interest or its impact on the estate tax during the three year span of negotiations; and, petitioner, by its stipulation, never intended to forego or preclude the deduction of statutory interest as an administrative expense. Furthermore, the respondent does not dispute that statutory interest is properly deductible as an administrative expense pursuant to section 2053.

In light of the specific facts and circumstances of this case, petitioner contends that the plain meaning of the exception

in subsection (2) of section 6512(a) allows suits for refunds of amounts paid in excess of the amount computed in accordance with the stipulated decision entered by the Tax Court in estate cases involving statutory interest. *Lakovich v. IRS*, 46 AFTR 2d 5037, 80-1 USTC par.9366 page 83,966 (D. Colo. 1980). In *Lakovich*, plaintiff taxpayer and his sister owned and operated a motel near Grand Lake, Colorado. During the tax year in question, taxpayer spent his weekends there and during the week worked as an engineer in Englewood, Colorado. While working in Englewood, he rented living space in nearby Littleton, Colorado. In his tax return, taxpayer claimed deductions for meals and lodging incurred during the work week, which he believed were incurred "while away from home in the pursuit of a trade or business" pursuant to section 162(a)(2). The Internal Revenue Service (hereinafter "IRS") disputed the deductibility of the expenses for the meals and lodging. The Tax Court determined that Englewood was the taxpayer's principal place of employment and disallowed his claimed deductions for meals and lodging during the week. Based on that decision, the taxpayer filed an amended return, claiming deductions for meals and lodging incurred while working at Grand Lake, away from his principal place of business as decided by the Tax Court. The IRS denied the claim and taxpayer brought a claim for refund in the district court.

The IRS alleged that the district court lacked jurisdiction based on section 6512 to hear the suit, because the tax in question was the subject of a Tax Court decision which affirmed a deficiency determination made by the IRS. It was further argued by the IRS that the Tax Court decision was *res judicata* as to all claims relating to the particular tax year.

After reviewing the authorities cited by the IRS, which included cases in the First, Second, and Ninth Circuits cited by respondent in this case, the district court in *Lakovich* was persuaded that the better interpretation of section 6512(a) permitted the taxpayer to pursue his claim for refund in the

district court. With respect to the exception to section 6512(a) set forth in subsection (2), the *Lakovich* court held:

> "The plain meaning of this subsection is that where the Tax Court has determined the proper method of computation of tax, a taxpayer may seek a refund for any amounts paid in excess of the proper amount. Under this interpretation of the statute, the holding of the Tax Court is not reviewed by the District Court, but rather is relied upon in reaching a determination." 80-1 USTC at page 83,968.

Petitioner similarly urges this court to recognize that the case at bar falls squarely within the subsection (2) exception to section 6512(a) contained in subsection (2). The stipulated decision of the Tax Court is not disputed but rather relied upon to arrive at a correct assessment of the estate tax liability.

The *Lakovich* court also reviewed authorities in estate tax cases which stood for the proposition that claims for refunds are not barred by a previous decision of the Tax Court where the later claim was based on attorney's fees which were not ascertainable with reasonable certainty at the time the first claim was adjudicated, citing *Van Dyke v. Kuhl,* 171 F.2d 187 (7th Cir. 1948), and *Magruder v. Safe Deposit & Trust Co.*, 159 F.2d 913 (4th Cir. 1947). The court also agreed with the reasoning in *Martin v. Broderick*, 177 F.2d 886 (10th Cir. 1949), to the effect that a claim for a refund of estate taxes should be allowed where the subsequent claim was not in being when the first claim was filed, and where the existence of the second claim was contingent on the disposition of the first claim.

The claim for refund in the case at bar is totally consistent with the stipulated Tax Court decision, and is based thereon. Petitioner's claim did not come into being until after the decision was entered by the Tax Court and the interest was ultimately assessed and paid. The statutory interest on the federal estate tax liability was deductible as an administrative

expense under section 2053 only after it had become ascertainable with reasonable certainty and not before. *Treasury Regulations on Estate Taxes* (1954) (26 *C.F.R.*section 20.2053-1(b)(3); T.D. 6296, 6/23/58 amend. T.D. 7238, 12/2/72. Only after the stipulated decision was entered, and the deficiency paid, and the interest ultimately accrued, computed and paid, could the refund claim be filed. *Snyder v. United States*, 84-1 USTC par.13,564 (D. Md. 1984). Petitioner simply could not have deducted the interest at the time the Tax Court decision was entered. The facts and circumstances of this case are squarely within the second exception to section 6512.

In *United States v. Wolf*, 238 F.2d 447 (9th Cir. 1956), the case on which the Ninth Circuit principally relies, the court made the following observation:

> "It seems to us that the circumstance which is common in our case and in the Moir and Elbert cases, namely, the overpayment which becomes demonstrable only after and in consequence of the tax court's decision, is fairly typical, and that this situation would arise in many tax cases, and that Congress must have contemplated that such would frequently be the case. We cannot believe that exception (2) was intended to apply in such cases, and thus serve in a substantial degree to make §322(c) inoperative." 238 F.2d at 451.

Statutory interest in estate tax cases is not "fairly typical" in the sense referred to by the *Wolf* court. It is a unique situation where the government is equated to a private lender so that an estate is not forced to sell its assets in order to pay its estate taxes, and suffer financial loss as a result. Unlike the facts and circumstances in *Wolf*, which involved a recharacterization by the Tax Court of various alleged deductions, the details and amounts of which were before the court, the amount of statutory interest is never determinable by the Tax Court. In *Wolf*, the Tax Court recharacterized a transaction from a sale of a piece of

equipment to a capital contribution of that equipment, with the result that the taxpayers subsequently alleged an overpayment of taxes based on the now non-existent profit from the disallowed sale. The amount of profit was completely determinable; it was on their tax returns. It was in existence, and before the Tax Court at all times. Petitioner urges that this type of scenario is the "fairly typical" situation referred to by the *Wolf* court.

On the other hand, statutory interest in an estate context is atypical. The statutory interest obligation in reality and in actuality does not arise until after the Tax Court decision becomes final. The taxpayer may be aware that it is coming because it is a creature of statute, but no obligation arises until the Tax Court determines the amount of the deficiency. As discussed previously, the Tax Court is bound by its rules of procedure to issue a judgment for a specific monetary amount of deficiency. It has no jurisdiction over interest. After the deficiency is determined, the IRS assesses the interest. *Commissioner v. Kilpatrick's Estate*, 140 F.2d 887 (6th Cir. 1944). No interest accrues until the deficiency is determined. And, if the taxpayer elects under section 6161 to pay his deficiency assessment in installments, the amount of interest cannot be determined with any "reasonable certainty" for purposes of the Tax Court proceedings. In fact, the government asserted this very contention of the uncertainty of the statutory interest amount to the Tax Court in *Estate of Bailly v. Commissioner*, 81 T.C. 949 (1983). In the case at bar, respondent asserted that the statutory interest was completely determinable and sought to apply the bar of section 6512. Respondent cannot have it both ways. Fairness, reason, and justice require fair and consistent treatment of taxpayers.

The Tax Court in *Estate of Bailly v. Commissioner*, 81 T.C. 949 (1983), was greatly troubled by the harshness of section 6512(a) with respect to estate tax cases. In the "interests of fairness and justice,"[5] the court agreed to postpone the

[5]It should be noted that respondent Commissioner did not object to the action taken by the Tax Court.

entry of its decision for ten years, until the last installment of estate tax liability was due, or the tax was paid, whichever event was earlier. The court took this drastic action because it felt that the taxpayer, as a matter of right, was entitled to its deduction for statutory interest; and, the court feared that the taxpayer *might* be precluded from its entitlement by the harsh application of section 6512. In order to insure that the taxpayer received his due, the court was forced to create the potential for "inconvenience, hardship, and administrative expense" to itself and the parties involved, by keeping the case open for up to ten years. 81 T.C. at 958. The atypical nature of statutory interest in estate tax cases, and fairness to the taxpayer and its rights, moved the Tax Court to take this unusual action. It was a policy decision by the court based on its perception of existing law.

Petitioner urges that this court similarly recognize the unique and atypical nature of statutory interest in estate tax cases as demonstrated by the Tax Court decision in the *Bailly* case, and by decisions based on *res judicata* in other circuits such as *Martin v Broderick*, 177 F.2d 886 (10th Cir. 1949), and make a determination that such cases in the Ninth Circuit fall within the second exception to section 6512. As a matter of public policy, such a decision is not only just, but will prevent the administrative hardship, expense, and inconvenience of the *Bailly* court solution. Such a decision will reduce litigation in estate tax cases. Further, such action will foster consistent treatment of taxpayers, and may prompt a much needed congressional solution to the problem.

A proper construction of section 6512(a)(2) dictates that the decision of the Ninth Circuit should be reversed. Statutory interest in an estate context falls within the exception to the bar of section 6512.

IV.

THIS COURT SHOULD GRANT CERTIORARI BECAUSE THE DECISION OF THE NINTH CIRCUIT IS IN CONFLICT WITH THE CASE LAW OF OTHER CIRCUITS, BECAUSE THE PROPER INTERPRETATION OF SECTION 6512(a) OF THE *INTERNAL REVENUE CODE* PRESENTS AN IMPORTANT ISSUE OF LAW, AND BECAUSE THE LAW SHOULD NOT EXALT FORM OVER SUBSTANCE.

The taxpayer in this case, petitioner in this court, recognizes that its loss of more than a million dollars does not represent, in itself, a sufficient basis for the granting of a writ of certiorari. Similarly, the fact that the government stands to receive a million dollar windfall is not, in itself, decisive. However, the confusing and conflicting interpretations of section 6512(a) of the *Internal Revenue Code* around the country justify intervention by the highest court in the land.

Rule 17.1 of the rules of this Court provides some guidelines for the granting of certiorari. In this case, certiorari is justified on two separate grounds. First, the Ninth Circuit decision is clearly in conflict with decisions in other circuits. Secondly, it is respectfully urged that the Ninth Circuit's construction of section 6512(a) of the *Internal Revenue Code* poses an important issue of federal law that should be settled by this Court.

In deciding the present case, the Ninth Circuit places primary reliance on one of its own earlier decisions, *United States v. Wolf*, 238 F.2d 447 (9th Cir. 1956), and totally ignores contrary authority from other circuits, cases such as *Van Dyke v. Kuhl*, 171 F.2d 187 (7th Cir. 1948), *Magruder v. Safe Deposit and Trust Company*, 159 F.2d 913 (4th Cir. 1947), and *Martin v. Broderick*, 177 F.2d 886 (10th Cir. 1949).

The taxpayer in this case contends that the *Wolf* case is distinguishable. Even if *Wolf* is not distinguishable, it is respectfully submitted that the *Wolf* case was wrongly decided

and that the contrary authorities from other circuits represent the correct view of the law.

The conflict between *Wolf* and the decisions of other circuits has existed for many years. In *Lakovich v. Internal Revenue Service*, 46 AFTR 2d. 5037, 80-1 USTC paragraph 9366, page 83,966 (D Colo. 1980), the United States District Court for the District of Colorado specifically noted the clear conflict in authority. It followed what it described as the "better interpretation" of section 6512(a), the interpretation that rejected the technical and formalistic approach of the *Wolf* court (Page 83,968).

In its decision, *First National Bank of Chicago v. United States*, 792 F.2d 954 (9th Cir., 1986), the court does mention one authority from another circuit, *Britton v. United States*, 532 F.Supp. 275 (D.Vt. 1981), and purports to distinguish the case on procedural grounds. The reasoning of the *Britton* court was, however, ignored. The key portion of the Britton opinion is as follows:

> "*Neither common sense nor the most rudimentary notion of fairness supports the government's position.* Even more to the point, section 6601(e)(1) contains an exception which implicitly exempts refund suits for the recovery of allegedly excessive amounts of interest from the bar imposed by section 6512. Section 6601(e)(1) removes references to interest in 'subchapter B of chapter 63, relating to deficiency procedures' from inclusion in the definition of 'tax' for purposes of the rest of the Internal Revenue Code. Chapter 63 governs the process of tax assessment by the IRS. Subchapter B defines a tax deficiency, provides for notice to the taxpayer, and establishes a procedure for seeking determination of a tax liability by the Tax Court. I.R.C. §§6211-6216. When section 6512(a) refers to notice of a tax deficiency pursuant to section 6212(a) and the subsequent filing of a petition by the taypayer, therefore, it must refer

> to tax exclusive of interest because interest would play no role in either the deficiency notice or the taxpayer's petition. Similarly, when section 6512(a) (in chapter 66) bars refund suits 'for the recovery of any part of *the* tax' (emphasis supplied), 'the tax' must mean the tax exclusive of interest which is the subject of the petition and not any and every tax-related liability including interest incurred by the taxpayer in connection with a given tax year. In short, 'the tax' in section 6512(a) means only the tax for purposes of the deficiency determination process set up by subchapter B and protected from collateral attack by section 6512. The calculation of interest due from the taxpayer is simply not a part of this process. *Accordingly, we hold that section 6512 does not bar a refund suit concerned with the assessment of interest even when the taxpayer has already filed a petition in Tax Court raising certain objections to other aspects of his tax liability for the same year.*" (Emphasis added.) 532 F.Supp. at 277-278.

Apparently, in the present case, the Ninth Circuit does not share the *Britton* court's concern with common sense and the most rudimentary notions of fairness. If the decision of the Ninth Circuit stands, the taxpayer will lose more than a million dollars because of a technical jurisdictional point.

In its reported decision, the Ninth Circuit in this case briefly mentions the tax court decision in *Estate of Baumgardner v. United States*, 85 T.C. 85-258 (1985). *First National Bank of Chicago v. United States*, 792 F.2d 954, 956 (1986). However, the Ninth Circuit fails to note the proposition for which the taxpayer cited *Baumgardner*. On its face, the *Baumgardner* decision reflects the position of the government, to the effect that the Tax Court had no jurisdiction over interest. Admittedly, the *Baumgardner* decision rejected this position on the part of the government. However, should the taxpayer in the present case be punished for acquiescing

in a longstanding position of the federal government, forfeiting over a million dollars?

As the authorities contained in this petition demonstrate, the interpretation of section 6512(a) of the *Internal Revenue Code* has long presented difficulties for taxpayers and courts alike. The government has taken different positions in different cases, always seeking to maximize the collection of taxes. In this particular case, a taxpayer stands to lose a million dollars simply because it acquiesced in the government's contention that the tax court had no jurisdiction over interest, a contention that was rejected many years later by the Tax Court.

It is appropriate for this court to grant certiorari where lower federal courts in various circuits have interpreted a federal statute in different ways. *United States v. Price,* 361 U.S. 304 (1960); *Nashville Milk Company v. Carnation Company*, 355 U.S. 373 (1958); *Safeway Stores v. Vance*, 355 U.S. 389 (1958). Such a situation exists here.

The substance of the position of the taxpayer in this case is clear. The taxpayer has a clearly valid claim of a million dollars against the government, based on an interest deduction which is valid. In fact, the deductibility of the interest is not even questioned. Nonetheless, the government seeks a million dollar windfall, relying on a technical jurisdictional interpretation of a vaguely worded federal statute. It is respectfully urged that substance should prevail over form, and the taxpayer should not be robbed of the million dollars to which it is properly entitled.

The need for this court to act is demonstrated by the conflicts that exist in the interpretation of section 6512(a) of the *Internal Revenue Code*. To resolve these conflicts, and assure uniform justice throughout the United States, this court should grant this petition for a writ of certiorari. As the *Baumgardner* case demonstrates, a long held government position on an issue of law can turn out to be wrong, even if at least some taxpayers acquiesce in it. The taxpayer in this case should not suffer a million dollar forfeiture because

the government was ultimately proved wrong on a technical issue of jurisdiction, many years after the fact.

V.

Conclusion.

For the foregoing reasons, it is respectfully submitted that the Supreme Court of the United States should grant this petition for a writ of certiorari, in order to consider the issue of the proper interpretation of section 6512(a) of the *Internal Revenue Code*. Thereafter, the judgment of the United States Court of Appeals for the Ninth Circuit, *First National Bank of Chicago v. United States*, 792 F.2d 954 (1986), should be reversed, and the view of the law expressed by the district court should be adopted. Substance should prevail over form, justice should be exalted over technical jurisdictional points, and a taxpayer should not suffer a million dollar forfeiture.

Respectfully submitted,

HAIGHT, DICKSON, BROWN & BONESTEEL
DEAN V. AMBROSE,
ROY G. WEATHERUP,

Attorneys for Petitioner,
FIRST NATIONAL BANK OF CHICAGO

APPENDIX

FILED

JUN 24 1986

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FIRST NATIONAL BANK OF CHICAGO, Plaintiff-Appellee, v. UNITED STATES OF AMERICA, Defendant-Appellant.	No. 84-6496 D.C. No. CV 83-1977-ER **OPINION**

Appeal from the United States District Court
for the Central District of California
Edward Rafeedie, District Judge, Presiding
Argued October 11, 1985; Submitted November 13, 1985
San Francisco, California

Before: BROWNING, KENNEDY, and HUG, Circuit Judges.

HUG, Circuit Judge:

This appeal principally concerns an interpretation of section 6512(a) of the Internal Revenue Code, 26 U.S.C. § 6512(a)

APPENDIX A

(1982). The Government contends that section 6512(a) deprives the district court of jurisdiction to hear the estate's claim for refund because the estate had previously filed a petition with the Tax Court contesting a deficiency assessed by the Internal Revenue Service ("IRS"). We agree with the Government's contention and reverse the district court's award of a refund.

First National Bank of Chicago was a trustee of six irrevocable inter vivos trusts (hereinafter the "Crummer Trust"). These trusts are presently administered by Continental Bank and Trust Company. The Crummer Trust was funded by the residue of the Hazel B. Crummer Estate. The estate tax return, filed on June 4, 1971, showed a tax liability calculated at $4,778,008. The IRS audited the return in 1974 and assessed a deficiency. The estate then filed a petition with the United States Tax Court, seeking a redetermination of the deficiency. Approximately three years later, the parties stipulated to a deficiency of $1,340,604 plus statutory interest. The stipulation was filed with the United States Tax Court on October 28, 1977.

The estate paid the agreed federal tax deficiency in installments, exclusive of interest. The last payment was made on April 17, 1978. The interest due on the stipulated deficiency was determined to be $630,700, and this payment was also made on April 17, 1978.

The interest payment was deducted from the estate's fiduciary income tax return, but this did not prove as beneficial to the estate as if it had been deducted from the estate tax return. On April 2, 1980, the estate filed an amended estate tax return, deducting this additional interest expense as an administrative expense under section 2053(a)(2) of the Internal Revenue code, 26 U.S.C. § 2053(a)(2) (1982). The IRS rejected the claim for refund, and the estate instituted this suit for refund in the district court.

The Government contended that the estate's claim was barred by *res judicata* and that section 6512(a) of the Internal Revenue Code deprived the district court of jurisdiction

because a prior petition had been filed with the Tax Court to contest the deficiency assessed by the IRS. The district court rejected the Government's *res judicata* and section 6512(a) arguments and held that the estate was entitled to a refund $478,794 plus interest, less the sum of $49,056 plus interest (representing the deduction on the fiduciary income tax return). We reverse on the ground that section 6512(a) deprives the district court of jurisdiction to hear the action for refund, and we find it unnecessary to reach the *res judicata* contention.

Section 6512(a) provides in pertinent part as follows:

> (a) *Effect of Petition to Tax Court.*
>
> If the Secretary has mailed to the taxpayer a notice of deficiency under section 6212(a) (relating to deficiencies of income, estate, gift, and certain excise taxes) and if the taxpayer files a petition with the Tax Court within the time prescribed in section 6213(a), no credit or refund of . . . estate tax in respect of the taxable estate of the same decedent . . . to which such petition relates . . . in respect of which the Secretary has determined the deficiency shall be allowed or made and no suit by the taxpayer for the recovery of any part of the tax shall be instituted in any court except—
>
> (1) . . . .
>
> (2) As to any amount collected in excess of an amount computed in accordance with the decision of the Tax Court which has become final . . . .

The estate contends that the defense based upon section 6512(a) was not raised in a timely fashion. However, this section speaks to subject matter jurisdiction. The lack of jurisdiction can be raised at any time and the parties cannot stipulate to the contrary. *California v. LaRue*, 409 U.S. 109, 112 n.3 (1972).

The estate sought a redetermination of its estate tax liability based on the interest paid on the stipulated deficiency, contending that the interest should be deducted as an administrative expense. The estate argues that the exception provided in section 6512(a)(2) permits the exercise of jurisdiction by the district court because the interest, and thus the overpayment, could not be determined until all installments of the tax payments were paid. A similar argument was made and rejected in *United States v. Wolf,* 238 F.2d 447 (9th Cir. 1956). In *Wolf*, we interpreted the meaning of section 322(c) of the Internal Revenue Code of 1939 (the predecessor to section 6512(a)) and stated:

> It is plain that § 322(c) was intended to have a broad general application so as to provide that if the taxpayer files a petition with the tax court, the mere filing of the petition operates to deprive the district court of jurisdiction to entertain a subsequent suit for refund. Moir v. United States, 1 Cir., 149 F.2d 455, 460. As stated in Elbert v. Johnson, 2 Cir., 164 F.2d 421, 424, "It is not the decision which the Tax Court makes but the fact that the taxpayer has resorted to that court which ends his opportunity to litigate in the District Court his tax liability for the year in question." To say that exception No. 2 has the broad application which the appellees claim for it, would, we think, give it a more extensive reach than Congress intended.

Id. at 449.

The *Wolf* decision is dispositive of this case. A redetermination in the district court of the estate tax, which was the subject of the prior Tax Court proceedings and judgment, is what is sought in this case and what was rejected in *Wolf.*

The district court relied on the analysis used in *Britton v. United States*, 532 F. Supp. 275, 277-78 (D. Vt. 1981), to avoid the application of section 6512(a). This reliance was

misplaced. In *Britton*, the taxpayers disputed the amount of interest paid, and specifically sought a refund of the excess. The court held that only the underlying tax assessment--not the subsequent interest payment--was covered by section 6512(a). In the case at bar, however, the estate is not concerned with the assessment and refund of interest. The estate is seeking a recomputation of its *estate tax liability* because of the interest it has paid.

In supplemental arguments, the estate has drawn our attention to a recent decision of the Tax Court, *Estate of Baumgardner v. United States,* 85 T.C. 85-258 (1985). The Tax Court there held that it had jurisdiction to consider interest paid on installments as a component of an "overpayment" of estate tax under section 6512(b). We find no support in this decision for the estate's argument that the section 6512(a)(2) exception is applicable here. There is nothing in the *Baumgardner* decision that would indicate that, at the time the stipulation was arrived at in the Tax Court, the estate was precluded from calculating the interest on the estate tax and adjusting the deficiency accordingly. Alternatively, the estate could have insisted that the entry of judgment be delayed until an appropriate adjustment could be made for the deduction of future interest payments. *See, e.g., Estate of Bailly v. Commissioner*, 81 T.C. 949 (1983) (postponing entry of judgment for ten years or until last installment of tax was paid).

The estate is not entitled to bring a refund action in the district court because section 6512(a) precludes the district court from redetermining the tax once the Tax Court has established the tax liability. As noted above, we need not address the issue of *res judicata* since section 6512 disposes of the case.

REVERSED.

ENTERED

MAY 30 1984

CLERK, U.S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
BY DEPUTY

FILED

MAY 25 1984

CLERK, U. S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
BY DEPUTY

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

FIRST NATIONAL BANK OF CHICAGO, TRUSTEE OF THE SIX IRREVOCABLE INTER VIVOS TRUSTS CREATED BY THE LIVING TRUST INDENTURE DATED JUNE 7, 1965 BY ROY E. CRUMMER AND HAZEL B. CRUMMER AS SETTLORS AND ROY E. CRUMMMER, JR., AS TRUSTEE, Plaintiff, v. UNITED STATES OF AMERICA, Defendant.	NO. CV 83-197-ER (Bx) **MEMORANDUM DECISION**

The plaintiff in this action is the First National Bank of Chicago, Trustee of Six Irrevocable Inter Vivos Trusts Created by the Living Trust Indenture Dated June 7, 1965 by Roy E. Crummer and Hazel B. Crummer as Settlors and Roy E. Crummer, Jr., as trustee. The defendant is the United States of America.

APPENDIX B

On or about June 4, 1971, Roy Crummer, Jr., in conformity with the provision of the Internal Revenue Code of 1954, as amended, timely filed the federal estate tax return for the Estate of Hazel B. Crummer, deceased, with the tax shown to be due thereon in the amount of $4,778,008.32.

The Commissioner of Internal Revenue (the government), upon audit and examination of this return, asserted a deficiency and issued a statutory notice of deficiency against the Estate. As a result, Roy Crummer, Jr., on behalf of the Estate, filed a petition with the United States Tax Court.

After substantial negotiation, a stipulation fixing the deficiency was signed in October, 1977 and entered in the tax court. The deficiency was paid in installments and ultimately paid in full by April, 1978. Interest was computed to the date of final payment and was itself paid in April, 1978. The Estate then filed a claim for refund on the ground that the interest paid on the stipulated federal estate tax deficiency is a deductible administrative expense under 26 U.S.C. § 2053(a)(2).

The subject of the deductibility to the estate of the interest on the deficiency was not discussed between the representatives of the estate and the government at any time during the negotiations which culminated in the stipulation or at any time prior to the payment of interest in April, 1978.

The government rejected the claim for refund and this action was commenced. The government has asserted two defenses in this case: (1) the plaintiff is barred by the *res judicata* effect of a stipulated estate tax deficiency from deducting interest later computed, assessed and paid thereon; and (2) I.R.C. § 6512 bars filing of this lawsuit in any court.

Plaintiff argues that the doctrine of *res judicata* does not bar the claim and that I.R.C. § 6512 may not be applied to this case.

The Court agrees with the arguments presented by the plaintiff for the following reasons:

The doctrine of *res judicata* as generally applied and as applied in tax cases does not preclude the raising of new claims, which had not arisen in the prior action but in fact are based upon new facts created by the first. *Martin v. Broderick*, 177 F.2d 886 (10th Cir. 1949). The rationale of this suit as well as other similar decisions was that administrative expenses (attorney's fees) at the time of the first suit were not then deductible because they were vague and uncertain, and could not be estimated with reasonable certainty.

This same rationale applies to the case before this Court. The claim for the interest deduction could not have arisen prior to the Stipulation. At that time, no deficiency had been established on which interest was due. After the amount of the deficiency was established by the stipulation of the parties, the interest due thereon was vague and uncertain and could only be determined after final payment.

At the time of the Stipulation, October 1977, the case *Estate of Bahr v. Commissioner*, 68 T.C. 74 (1977) was the state of the law. This case held that interest on a federal tax deficiency is a deductible administrative expense under 26 U.S.C. § 2053(a)(2). The question was to when and how the deduction may be taken was not answered until Rev. Ruling 80-250 and Rev. Proc. 81-27 in 1980 and 1981. These rulings, which came into existence after the Stipulation, are in accord with what the plaintiff anticipated; to wit, that the claim for deduction arose when the interest accrued and that the claim for refund arose after the final payment was made. Since the interest in the case before us did not arise until April 1978, it could not be precluded by the prior Stipulation.

As plaintiff's claim relates to the subject of interest, I.R.C. § 6512 has no application. Interest on a deficiency is not part of the tax. Indeed, deficiency interest is specifically excluded by I.R.C. § 6601(e)(1) from being treated as part of a tax. Section 6601(e)(1) provides in pertinent part "Any reference in this title (except Subchapter B of Chapter 63, relating to deficiency procedures) to any tax imposed by this

title shall be deemed also to refer to interest imposed by this section upon such tax." Subchapter B addresses the deficiency procedures in the case of income, estate, gift and certain excise taxes, and in the statutory authority for the proceedings ending in the stipulated deficiency.

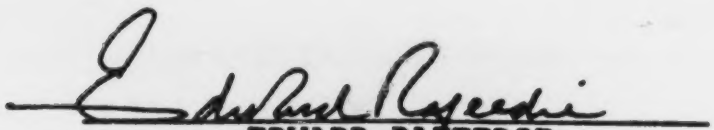
In *Britton v. United States*, 532 F.Supp. 275 (D. Vt. 1981) aff'd without Op.697 F.2d 288 (2 Cir. 1982) the District Court dealt with the issue of whether, for purposes of 26 U.S.C. § 6512(a), the tax included the interest as well as the amount of the underlying assessment. The Court Stated:

> "When § 6512(a) refers to a notice of a tax deficiency pursuant to Section 6212(a) and the subsequent filing of a petiton by the taxpayer, therefore, it must refer to the tax exclusive of interest because interest would play no role in either the deficiency notice or the taxpayer's petition. Similarly, when § 6512(a) (in chapter 66) bars refund suts 'for the recovery of any part of the tax' (emphasis supplied) 'the tax' must mean the tax exclusive of interest which is subject of the petition and not any and every tax-related liability including interest incurred by the taxpayer in connection with a given tax year. In short, the tax in § 6512(a) means only the tax for purposes of the deificiency determination process set up by subchapter B and protected from collateral tax by § 6512." *Britton v. United States*, supra 278.

The Court reasoned that I.R.C. § 6512 does not act to bar a refund suit concerned with the assessment of interest even if the taxpayer has already filed a petition in Tax Court. The case at bar only deals with matters relating to the assessment of interest, no issues were litigated on their merits in the Tax Court, which could not have decided the interest issue, as it could not have been determined at that time. Consequently, I.R.C. § 6512 cannot prevent plaintiff's present claim for refund which is based on the assessment of interest.

The Court, therefore, holds that this Court has the jurisdiction to hear this case and that the doctrine of *res judicata* does not bar the plaintiff's claim for refund. In accordance with the stipulation in the Pretrial Conference Order, the Court orders that the plaintiff is entitled to its claim for refund in the sum of $478,894.00 and interest. Let judgment be entered accordingly.

Dated: May 25, 1984.



EDWARD RATTEEDIE
United States District Judge

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CENTRAL DISTRICT OF CALIFORNIA
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CLERK U. S. DIST.
CENTRAL DISTRICT OF CALIFOR
BY DEPUT

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

FIRST NATIONAL BANK OF CHICAGO, TRUSTEE OF THE SIX IRREVOCABLE INTER VIVOS TRUSTS CREATED BY THE LIVING TRUST INDENTURE DATED JUNE 7, 1965 BY ROY E. CRUMMER AND HAZEL B. CRUMMER AS SETTLORS AND ROY E. CRUMMER, JR., AS TRUSTEE, Plaintiff, v. UNITED STATES OF AMERICA, Defendant.	NO. CV 83-1977-ER (Bx) **JUDGMENT**

This action came on for trial before the Court on May 22, 1984, the Honorable Edward Rafeedie, District Court Judge presiding, and the issues having been duly heard and a memorandum decision having been duly rendered,

APPENDIX C

IT IS ORDERED AND ADJUDGED,

That the plaintiff First National Bank of Chicago, as Trustee, recover from the defendant United States of America the sum of $$478,794 and interest thereon as provided by the Internal Revenue Code of 1954, as amended (the "Code"), less the sum of $49,056.21 and less interest on said sum of $49,056.21 accruing after June 30, 1984, and its costs of action.

Dated: Sept. 6, 1984.

EDWARD RAFEEDIE

EDWARD RAFEEDIE
United States District Judge

PROOF OF SERVICE BY MAIL

State of California

ss.

County of Los Angeles

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is 11333 Iowa Avenue, Los Angeles, California 90025; that on September 22, 1986, I served the within *Petition for Writ of Certiorari* in said action or proceeding by depositing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

Clerk, United States
Supreme Court
One First Street, N.W.
Washington, D.C. 20543
(Original and forty copies)

Solicitor General
U.S. Department of Justice
Tenth and Constitution
Avenue
Washington, D.C. 20530

Clerk of the U.S. Court
of Appeals
U.S. Court of Appeals
Courthouse Building
Seventh and Mission Streets
Post Office Box 547
San Francisco, California
94101

Michael L. Paup
Chief, Appellate Section
Tax Division
U.S. Department of Justice
Washington, D.C. 20530

Robert C. Bonner, Esquire
United States Attorney
312 North Spring Street
Los Angeles, California 90012

Laurie A. Snyder, Esquire
Office of the Assistant
Attorney General
Tax Division
U.S. Department of Justice
Room 4529
Main Justice Building
Washington, D.C. 20530

The Honorable Edward Rafeedie
United States Courthouse
312 North Spring Street
Los Angeles, California 90012

Glenn L. Archer, Jr.
Assistant Attorney General
Tax Division
U.S. Department of Justice
Washington, D.C. 20530

Jonathan S. Cohen, Esquire
Office of the Assistant Attorney General
Tax Division
U.S. Department of Justice
Room 7118
Old Star Building
Washington, D.C. 20530

I declare under penalty of perjury that the foregoing is true and correct. Executed on September 22, 1986, at Los Angeles, California.

Sharon L. Stewart
(Original signed)

Supreme Court, U.S.
FILED
DEC 29 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-478

In the Supreme Court of the United States

OCTOBER TERM, 1986

FIRST NATIONAL BANK OF CHICAGO, ETC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

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Moir v. *United States*, 149 F.2d 455 (1st Cir. 1945) 5

United States v. *Wolf*, 238 F.2d 447 (9th Cir. 1956) 5

Statute:

Internal Revenue Code of 1954 (26 U.S.C.):

§ 2053(a)(2) 2

§ 6512(a) 1, 2, 3, 4, 5

§ 6512(a)(2) 4

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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner challenges the court of appeals' holding that Section 6512(a) of the Internal Revenue Code[1] deprived the district court of jurisdiction to hear petitioner's claim for refund of federal estate taxes, because the estate previously had filed a petition with the Tax Court contesting the same tax liability.

1. Petitioner was the trustee of six inter vivos trusts funded by the estate of Hazel B. Crummer. In 1974, the Commissioner asserted a deficiency in estate taxes against the estate, and the estate filed a petition with the Tax Court seeking a redetermination of the deficiency. Approximately three years later, the parties stipulated to a deficiency of $1,340,604, plus statutory interest. Pursuant to the parties'

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[1]Unless otherwise noted, all statutory references are to the Internal Revenue Code (26 U.S.C.), as amended (the Code or I.R.C.).

stipulation, the Tax Court on October 28, 1977, entered its decision that the estate was liable in those amounts. The estate paid the stipulated deficiency in installments, making the last payment on April 17, 1978. The total interest due was determined to be $630,700, and that amount was also paid on April 17, 1978. Pet. App. A2.

The estate initially claimed the $630,700 interest expense as a deduction on its fiduciary income tax return. However, this turned out to be less beneficial to the estate than deducting the interest as an administrative expense on its estate tax return. See I.R.C. § 2053(a)(2). Therefore, on April 2, 1980, the estate filed with the IRS a claim for refund of estate taxes, seeking to deduct the interest payment against the gross estate and to recalculate the estate tax liability previously determined by the Tax Court. The Commissioner rejected the refund claim, and petitioner, as the fiduciary of the beneficiaries of the estate, instituted this refund suit in the United States District Court for the Central District of California. Pet. App. A2.

The sole issue disputed by the parties was whether the district court had jurisdiction to entertain petitioner's suit. The government maintained that the refund action was barred by the res judicata effect of the Tax Court's decision and by Section 6512(a) of the Code, which deprives the district courts of jurisdiction where a taxpayer has filed a petition in the Tax Court to contest a deficiency asserted by the IRS. The district court rejected both arguments (Pet. App. B1-B5). It held that res judicata did not apply because the interest expense did not arise until after the completion of the Tax Court proceedings (*id.* at B3). And the court held that Section 6512(a) did not apply to a claim based solely on interest (Pet. App. B3-B4). Accordingly, it concluded that the estate was entitled to an estate tax refund of $478,794 plus interest, less an adjustment in the sum of $49,056 plus interest; the latter amount was intended to reflect the tax

benefit that had resulted from the deduction of the interest expense on the estate's fiduciary income tax return (*id.* at C1-C2).

The court of appeals unanimously reversed, holding that Section 6512(a) barred petitioner's refund action. The court explained that Section 6512(a), by its plain terms, prohibits a taxpayer from suing in district court for a recomputation of an estate tax liability that has already been redetermined by the Tax Court. Pet. App. A4-A5. The court of appeals accordingly found it unnecessary to reach the government's res judicata contention (*id.* at A3).

2. The court of appeals correctly held that petitioner's refund action was barred by Section 6512(a) of the Code. That section generally provides that, if the Commissioner has mailed a notice of deficiency with respect to estate tax and if the taxpayer has filed a timely petition with the Tax Court, "no credit or refund * * * of estate tax in respect to the taxable estate of the same decedent * * * shall be allowed or made and no suit by the taxpayer for recovery of any part of the tax shall be instituted in any court." The language of the statute plainly establishes that a taxpayer cannot bring a refund suit in district court alleging that the estate tax liability determined by the Tax Court in a prior proceeding was too high.

a. Petitioner contends (Pet. 12-14) that Section 6512(a) is inapplicable here because statutory interest is not part of the "tax" and played no role in the deficiency proceedings in the Tax Court. That contention is without merit. As the court of appeals explained, petitioner does not dispute the amount of interest due and paid on the estate tax deficiency as redetermined by the Tax Court. Rather, petitioner "is seeking a recomputation of its *estate tax liability*" based upon the deduction of that interest against the gross estate (Pet. App. A5 (emphasis in original)). Contrary to petitioner's suggestion (Pet. 13, 21-22), therefore, the decision

below is fully consistent with *Britton* v. *United States*, 532 F. Supp. 275, 277 (D. Vt. 1981), aff'd, 697 F.2d 288 (2d Cir. 1982), which involved a suit for refund of allegedly excessive amounts of interest paid on the Tax Court judgment.

b. Petitioner also errs in contending (Pet. 14-19) that this case falls within the exception set forth in Section 6512(a)(2). That subsection provides that the general prohibition against district court jurisdiction set forth in Section 6512(a) does not apply "[a]s to any amount collected in excess of an amount computed in accordance with the decision of the Tax Court which has become final." But petitioner paid the deficiency determined by the Tax Court and the statutory interest thereon, exactly as it was directed by the Tax Court's decision. Thus, the estate clearly did not pay any amount "in excess of [the] amount computed in accordance with the decision of the Tax Court." Instead, as the court of appeals correctly observed, the refund petitioner now seeks is grounded solely upon its attempt to obtain a "redetermination in the district court of the estate tax, which was the subject of the prior Tax Court proceedings and judgment" (Pet. App. A4).

Petitioner asserts (Pet. 18) that the amount of interest available as a deduction was indeterminate at the time the parties agreed to the stipulated deficiency in the Tax Court, and hence that the literal application of Section 6512(a) contravenes "[f]airness, reason, and justice." That contention is plainly mistaken. At the time the stipulation was agreed upon, the estate could have calculated the interest due, claimed a deduction therefor against the gross estate, and adjusted the stipulated deficiency accordingly. Alternatively, as petitioner now recognizes (Pet. 18-19), it could have asked the Tax Court to defer entry of judgment for approximately six months until final payment of the interest occurred, whereupon an appropriate adjustment of the deficiency could have been made. The estate evidently failed

to take such steps because of its belief that the proper treatment of the interest expense was to deduct it on the estate's fiduciary income tax return. That belief may have been erroneous, but that is no reason to ignore the plain language of the statute. Section 6512(a) operates "in effect [as] a statute of limitations," barring refund actions based upon events that occur following the final Tax Court determination. *United States* v. *Wolf*, 238 F.2d 447, 450-451 (9th Cir. 1956). See also *Elbert* v. *Johnson*, 164 F.2d 421, 424 (2d Cir. 1947) (where Tax Court had no jurisdiction to grant relief requested, subsequent refund suit was nonetheless barred); *Moir* v. *United States*, 149 F.2d 455, 458-460 (1st Cir. 1945) (petition to Tax Court barred subsequent action for refund of estate taxes based upon the deduction of attorney's fees).[2]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

DECEMBER 1986

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[2]Petitioner's contention (Pet. 20) that the decision below conflicts with decisions of other circuits is wholly without merit. In none of the cases relied upon by petitioner did the estate initiate proceedings in the Tax Court, and hence the applicability of Section 6512(a) was not in issue and was not addressed by the courts. Those cases did consider the application of res judicata principles to an estate tax refund suit based on an attempt to deduct administrative costs against the gross estate. Hence, they might be relevant had the court of appeals ruled that res judicata principles barred the refund suit here. The court, however, explicitly declined to reach that issue (Pet. App. A3), and it therefore is not properly before this Court.